IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

GEORGE E. SULLIVAN,
Petitioner,
v.
EUGENE MEYER

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia has not been officially reported, but it will be found at page 253 of the record.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by

the Act of February 13, 1925, Chap. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A., Sec. 347). The judgment of the United States Court of Appeals for the District of Columbia was entered February 29, 1944 (R. 254).

III.

STATEMENT OF CASE

A full statement of the case is included in the petition.

IV.

SPECIFICATIONS OF ERRORS INTENDED TO BE URGED

(1) The United States Court of Appeals for the District of Columbia erred in holding that appellee was entitled to a directed verdict on the issue of fair comment.

(2) The United States Court of Appeals for the District of Columbia erred in holding that the District Court correctly instructed the jury:

> "The jury are instructed that the truth is an absolute defense in an action for libel, and if they find that 'The Road to Victory' was in fact a defeatist, anti-Jewish book, as those words would be understood by ordinary readers of *The Washington Post*, their verdict must be for the defendant." (R. 31)

(3) The United States Court of Appeals for the District of Columbia erred in holding that the con-

tents of the book "The Road to Victory" sufficiently support the jury's verdict.

(4) The United States Court of Appeals for the District of Columbia erred in holding that it was "at least a reasonable opinion" that said book was "defeatist as well as anti-Jewish."

(5) The United States Court of Appeals for the District of Columbia erred in refusing to hold that appellant had an undoubted right to recover compensatory damages against appellee.

(6) The United States Court of Appeals for the District of Columbia erred in failing to hold that appellant was denied a fair and impartial jury through inclusion of three disqualified members.

(7) The United States Court of Appeals for the District of Columbia erred in affirming the judgment of the District Court of the United States for the District of Columbia.

V.

ARGUMENT

(a) EXTENT OF FAIR COMMENT.—Under the sound majority rule long prevailing in Federal Courts and in most State Courts, fair comment does not extend to misstatement or distortion of fact. *Post Pub. Co.* v. *Hallam* (C.C.A.), 59 F. 530, (Opinion by then Circuit Judge Taft); *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, (Opinion by Judge Oliver Wendell Holmes); *Washington Times Co.* v. *Bonner*, 66 App. D. C. 280, 86 F. 2d. 836, (Opinion by Justice Stephens), explaining and re-

jecting the minority or Kansas rule represented by *Coleman* v. *MacLennan*, 78 Kan. 711, 98 P. 281). The minority or Kansas rule has apparently interested the United States Court of Appeals for the District of Columbia favorably only since Justice Edgerton, of Kansas, became a member of that Bench; but it has since then become so enamored of the unsound minority rule that it has, in an opinion by Justice Edgerton in *Sweeney* v. *Patterson*, 76 U. S. App. D. C. 23, 128 F. 2d 457, actually cited as an approved authority on fair comment the very Kansas decision, *Coleman* v. *MacLennan supra*, which had been identified in *Washington Times Co.* v. *Bonner supra* as "The leading case representative of that (minority) view" then emphatically rejected. The majority rule is obviously necessary to safeguard freedom of expression and prevent it from degenerating into licentiousness. Under such majority rule, a necessary safeguard is maintained against the silencing of freedom under the pretense of giving greater freedom. Comment upon disclosed facts may be freely made, the facts disclosed constituting an antidote for any overzealous comment, but without a disclosure of the facts, or (what is worse) with a misstatement or distortion of the facts embodied in the comment or accompanying it, the doctrine of fair comment is not applicable. Criticism must be founded on truth, and false statements or attacks on private character are not permitted. *Ott* v. *Murphy*, 160 Iowa 730, 141 N. W. 463. In the case at bar, the libelous article avoided giving the *name* of any book or giving any disclosure of the real scope and contents of any book, but was content with *nam-*

ing the person sought to be defamed and making use of innuendo and prevarication for the purpose.

(b) RIGHT OF CRITICISM IN WARTIME.— The upholding of this right by this Court in *Frohwerk* v. *United States*, 249 U. S. 204, 208, 63 L. ed. 561, 565, is seriously impaired if perversions of the settled rule regarding fair comment not extending to misstatement or distortion of fact shall be tolerated, because, in such event, powerful publishers can readily silence intelligent individual patriotism by the use of clever innuendo and shameless prevarication to impugn the loyalty of, or otherwise injure, such individuals. The case at bar, as well as the earlier case of *Sullivan* v. *Meyer*, 67 App. D. C. 228, 91 F. 2d 301, illustrate in a practical way just how this may be done, and that the obtaining of redress is hopeless unless this Honorable Court exercises its power of supervision to put an end to the giving of judicial sanction to such performances. This Honorable Court has been exceptionally alert against every type of foul blow against the rights of the citizen, whether delivered in or out of Court. In *Viereck* v. *United States*, 318 U. S. 236, relief was given against what this Court did not hesitate to denounce as a "foul blow" delivered in the course of judicial proceedings, and it did not treat it as any less a foul blow because the United States Court of Appeals for the District of Columbia declined to give relief against it.

(c) EQUAL JUSTICE UNDER LAW REQUIRES JUDGES TO MAKE LEGAL RULINGS AND MAKE THEM EFFECTIVE, AND NOT LEAVE IT TO JURIES TO MAKE SUCH LEGAL RULINGS ABORTIVE. — The leading

case on this point, as applied to libel, is *Commercial Pub. Co.* v. *Smith*, 149 F. 704, 79 C.C.A. 410, quoted with approval by this Honorable Court in *Washington Post Co.* v. *Chaloner*, 250 U. S. 290, 63 L. ed. 987.

(d) JUSTIFICATION IN LIBEL MUST BE AS BROAD AND COMPLETE AS THE LIBEL ITSELF. — This fundamental rule is well stated in *Grand Union Tea Co.* v. *Lord*, 231 F. 390, 394 (C.C.A. 4th Cir.). Since appellee in the case at bar disclaimed justification of innuendos impugning appellant's loyalty, electing instead to deny such impugning, and since such denial is at variance with the obvious nature and character of the libel, it followed that the attempted justification was in any event too narrow and insufficient,—a perfectly obvious condition, which, however, neither the District Court nor the Court of Appeals seems to have been able to comprehend.

(e) JUDGMENT FOR PETITIONER REQUIRED FROM ANY LEGAL STANDPOINT.— Not only is there no possible basis in the pleadings or evidence for a judgment in behalf of appellee, but, on the contrary, there is no conceivable legal standpoint warranting other than a judgment for appellant. The display heading "NAZI PROBE" used in libeling appellant was neither inadvertent nor irrelevant. It gave one meaning only to the words "*himself* the author of a defeatist, anti-Jewish book," namely, that the loyalty of a person was impugned. As stated in the leading case of *Commercial Pub. Co.* v. *Smith supra*,——

"the whole item, *including display lines*, should

be read and construed together, and its meaning and significance thus determined."

Of what value, therefore, is the opinion of the Court of Appeals in the case at bar which, in the face of the plain record to the contrary, assumes the existence of a basis for "a reasonable opinion" by appellee that appellant's book "was defeatist as well as anti-Jewish"? The book throughout demands victory, not defeat, for our Republic and for Americanism. It urges also fair and constructive remedies to rescue Jews and non-Jews from the organized intolerance, persecution and greed of Talmudists, who were known as Pharisees in the time of the Divine Saviour and were denounced as wicked foes of all humanity by the Divine Saviour, who loves all mankind. There is no conceivable basis for any impartial legal mind to consider appellant's book as either defeatist or anti-Jewish. Truth cannot be anti-anything except anti-falsehood.

(f) FAIR AND IMPARTIAL JURY DENIED PETITIONER.—The denial of this right by the District Court (R. 10-12) passed unnoticed by the Court of Appeals in virtue of the latter's acceptance of the fair comment defense of appellee which the District Court had rejected. Such denial affected a substantial right of appellant, which is going to be important to him even when his unquestioned right to a recovery is recognized by direction of this Honorable Court, because appellant will be entitled to have his damages assessed by a fair and impartial jury. In *United States* v. *Wood*, 299 U. S. 123, 81 L. ed. 78, involving a conviction of larceny "from a pri-

vate corporation" (p. 131), this Court, in holding a Government employee not disqualified to sit as a juror, was careful to say that disqualification might exist in "some special and exceptional case" (p. 150). It is difficult to conceive of any more obviously "special and exceptional case" than the case at bar, yet the District Court insisted upon permitting three Federal employees in a New Deal administration to serve on a jury to supposedly give fair and impartial consideration to appellant's book strongly criticizing the New Deal program. Must not disqualification be imputed as matter of law and common sense in such a situation, no matter what such Federal employees may say as to lack of fear of dismissal, when it is perfectly obvious that a public admission of such fear might itself endanger such dismissal? Such Federal employees of the Executive Branch were not made independent by any protective tenure of office as are Federal Justices.

CONCLUSION

It is submitted that the writ of certiorari should be granted, and that this Honorable Court should review the judgment of the United States Court of Appeals for the District of Columbia in the case at bar and, finally, reverse it.

WILLIAM J. NEALE,

GEORGE E. SULLIVAN,

Counsel for Petitioner.